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6
7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 JENNIFER HARRISON, an Individual,
LESA ANTONE, an Individual,
10 RUSSELL JAFFE, an Individual, and
JEREMY BRONAUGH, an Individual,

11 Plaintiff,

12 vs.

13 KATIE HOBBS, an Individual,
14 Defendant.
15

CASE NO. CV2018-006623

**MOTION TO DISMISS PLAINTIFFS'
COMPLAINT**

(Honorable Pamela Gates)

16 **Introduction**

17 This is a defamation lawsuit stemming from a tweet by Defendant Katie Hobbs,
18 an Arizona State Senator, Democratic Minority Leader, and candidate for Secretary of
19 State. Plaintiffs are four individuals who appear alongside Governor Doug Ducey in a
20 photograph featured in the tweet. In the text of the tweet, Senator Hobbs characterized a
21 hand gesture made by one of the Plaintiffs as a “white supremacist sign,” stated that the
22 Plaintiffs were part of a group that intimidated visitors and harassed staffers at the
23 Arizona Capitol, and implored the Governor to denounce his association with the group.
24 The United States and Arizona Constitutions compel the dismissal of this suit. Senator
25 Hobbs’s characterization of the hand symbol—in a tweet that touched on a matter of
26 public concern—is not provably false and therefore constitutes protected opinion under
27 the First Amendment. And while Plaintiffs deny having personally intimidated visitors
28 or harassed staffers at the Arizona Capitol, Senator Hobbs never alleged that they did.

1 Rather, the tweet said that Plaintiffs were *part of the group* that did—an allegation the
2 Complaint does not deny. Plaintiffs have therefore failed to allege the element of falsity
3 and the requirement that the allegedly defamatory speech be “of and concerning” them as
4 individuals. Even if the tweet were defamatory, Senator Hobbs is immune from liability
5 under the Speech and Debate Clauses of the United States and Arizona Constitutions.
6 The tweet was made during the legislative session and—by the Complaint’s own terms—
7 in Senator Hobbs’s capacity as Senate Minority Leader. In urging the Governor to
8 denounce a group that disturbed the peace and tranquility of the Legislature’s place of
9 business, the tweet was necessary to prevent impairment of legislative deliberation. That
10 the tweet was directed at the Governor and implored him to take action on the matter
11 implicates Senator Hobbs’s right of petition. Because this lawsuit seeks to impede that
12 right, it should further be dismissed under Arizona’s anti-SLAPP statute, entitling
13 Senator Hobbs to her attorneys’ fees incurred in bringing this motion.

14 **Background**

15 Katie Hobbs is an Arizona State Senator and Senate Minority Leader. Compl.
16 ¶ 4. On April 29, 2018, while acting in her capacity as Senate Minority Leader, she
17 tweeted a photograph of the Plaintiffs with Governor Doug Ducey, where Plaintiff
18 Antone is making an “A-OK” hand gesture. Compl. ¶ 5. The tweet included the caption:

19 Governor Ducey, I hope you realize this woman is flashing a white
20 supremacist sign. These are part of the group that shows up at the Capitol
21 w/AR-15’s and harass elementary school children and democratic staff,
22 calling them illegals. You must denounce.

23 Compl. ¶ 5.

24 Plaintiffs allege that the tweet sought to characterize them as “white
25 supremacists.” Compl. ¶ 6. They also make a limited denial, stating:

26 The entire statement that ‘Plaintiffs were flashing a white supremacist hand
27 gesture; that Plaintiffs showed up at the Capitol with AR-15 weaponry; that
28 Plaintiffs harassed elementary school children and that Plaintiffs called
democratic staff illegals’ is false as it pertains to the Plaintiffs.

1 Compl. ¶ 9 (emphasis added).

2 Notably, the tweet never said that the Plaintiffs themselves showed up at the
3 Capitol with weapons, that they harassed school children, or that they called Democratic
4 staff “illegals.” Rather, the tweet said that Plaintiffs “*are part of the group*” that did so.
5 Compl. ¶ 5. Despite a conclusory allegation that the tweet was “made of and concerning
6 Plaintiff’s [sic],” Compl. ¶ 7, the Complaint’s denial of the facts alleged in the tweet is
7 much more limited:

8 Plaintiffs are not white supremacists, nor is the AOK [sic] hand gesture any
9 type of secret white supremacy hand gesture. The Plaintiffs have not
10 carried AR-15 weaponry to the Arizona Capitol. The Plaintiffs have never
11 harassed elementary school children and the Plaintiffs have not called
democratic staff illegal.

12 Compl. ¶ 10 (emphasis added).

13 Plaintiffs brought this suit against Senator Hobbs for defamation.

14 Argument

15 The Complaint takes issue with two statements in the tweet. The first is Senator
16 Hobbs’s characterization of Plaintiff Antone’s hand gesture as a “white supremacist
17 sign.” Compl. ¶¶ 5, 9–10. The second is the statement that Plaintiffs “are part of the
18 group that shows up at the Capitol w/AR-15’s and harass elementary school children and
19 democratic staff, calling them illegals.” Compl. ¶¶ 5, 9–10.

20 Neither statement is actionable. The first does not include any provably false
21 assertion of fact; it instead reflects Senator Hobbs’s opinion on a matter of public
22 significance. The second statement is not alleged to be false, at least inasmuch as
23 Plaintiffs do not dispute they “are part of the group” that has carried weapons at the
24 Capitol and harassed schoolchildren and staffers. The tweet never alleged that Plaintiffs
25 themselves had engaged in this conduct, and it is therefore not “of and concerning” them
26 as individuals.

1 Further, and as the Complaint makes explicit, Senator Hobbs issued the tweet in
2 her capacity as Senate Minority Leader. In doing so, she sought to prevent impairment of
3 legislative deliberation by denouncing a group that harassed legislative visitors and staff.
4 She is therefore immune from liability under the Speech and Debate Clauses of the U.S.
5 and Arizona Constitutions. Additionally, because the suit seeks to impede Senator
6 Hobbs's right of petition, it should further be dismissed pursuant to Arizona's anti-
7 SLAPP law, thereby entitling Senator Hobbs to her attorneys' fees.

8 Even taking the well-pleaded allegations in the Complaint as true, the Complaint
9 fails to state a claim under which relief can be granted and should be dismissed for that
10 reason. *See* Ariz. R. Civ. P. 12(b)(6). Doing so at this stage is both procedurally
11 appropriate and helps ensure the protections of the First Amendment. *See Citizen Publ'g*
12 *Co. v. Miller*, 210 Ariz. 513, 516 (2005) (noting the appropriateness of review when the
13 court "can determine from the pleadings a case-dispositive First Amendment defense");
14 *Scottsdale Publ'g, Inc. v. Superior Court*, 159 Ariz. 72, 74 (App. 1988) (noting the
15 importance of early review to "relieve the parties and the court of a prolonged, costly,
16 and inevitably futile trial"); *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1258
17 n.10 (S.D. Miss. 1988) ("[C]ourts routinely consider on motions to dismiss issues such
18 as whether the statement at bar is capable of bearing a defamatory meaning, whether it is
19 'of and concerning' the plaintiff, whether it is protected opinion, whether there is
20 jurisdiction over the defendant, and whether the suit is barred by privilege and frequently
21 grant motions on these grounds and others.") (quoting R. Sack, *Libel, Slander & Related*
22 *Problems* 533-34 (1980)).

I. Hobbs's Characterization of a Hand Gesture as a "White Supremacist Sign" Is Constitutionally Protected Opinion.

A. A statement regarding matters of public concern must be provably false to be actionable.

Falsity is a threshold element of defamation. *See Turner v. Devlin*, 174 Ariz. 201, 203–04 (1993) ("To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation." (internal quotation marks omitted)). And as a matter of constitutional law, "[a] statement regarding matters of public concern must be provable as false before a defamation action can lie." *Id.* at 205 (citing *Milkovich v. Lorian Journal Co.*, 497 U.S. 1, 16, 19 – 20 & n.6 (1990)). That is, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 497 U.S. at 20.

Turner is directly on point, recognizing the principle that the First Amendment "provide[s] protection for statements that 'cannot reasonably [be] interpreted as stating actual facts' about an individual." *Id.* at 204 (quoting *Milkovich*, 497 U.S. at 19–20). In *Turner*, the defendant wrote a letter characterizing the plaintiff police officer's interrogation of a student as "rude and disrespectful" and stating that "his manner bordered on police brutality." *Id.* at 202. The court found the letter to address a matter of public concern because it alleged police misconduct. *See id.* at 205 ("Whether speech addresses a matter of public concern must be determined by the expression's content, form, and context as revealed by the whole record." (internal quotation marks and alterations omitted)). By touching on matters of public concern, the statement had to be provable as false to be actionable. *Id.* at 206.

The court then determined that, as a matter of law, the plaintiff's assessment of the defendant's interrogation "reveal[ed] nothing more than [the plaintiff's] subjective impression of [the defendant's] 'manner,'" and that "[t]he statements alleged to be defamatory contain no factual connotations that are provable." *Id.* at 207. The court

1 further noted that it could “conceive of no objective criteria that a jury could effectively
2 employ to determine the accuracy” of the plaintiff’s subjective assessment, observing that
3 “[w]hether her assessment is true or false is simply not the kind of empirical question a
4 factfinder can resolve.” *Id.* (internal quotation marks omitted). That is, her comments
5 had “no bench mark with which to judge their accuracy.” *Id.* The court concluded that
6 the U.S. Supreme Court’s decision in *Milkovich* “made clear that First Amendment
7 protection should not turn on such an intensely subjective evaluation.” *Id.*

8 **B. Senator Hobbs’s Statement Is Not Provably False.**

9 Here, as in *Turner*, the expression relates to a matter of public concern. Senator
10 Hobbs, in her capacity as Senate Minority Leader, implored Governor Ducey to denounce
11 what she characterized as hateful, harmful views. She further alleged that the group to
12 which Plaintiffs belonged intimidated and harassed visitors and staff at the Capitol. Such
13 intimidation and harassment would necessarily impede the work of the Legislature.

14 Also as in *Turner*, Senator Hobbs’s characterization of the meaning of Plaintiff
15 Antone’s hand gesture constitutes “subjective impressions, unprovable as false.” *Id.* at
16 209. Hand gestures mean different things to different people. That is why courts have
17 held that one’s characterization of another’s hand gesture constitutes protected opinion.
18 *See Palestine Herald-Press Co. v. Zimmer*, 257 S.W.3d 504, 512 (Tex. App. 2008)
19 (holding that a defendant’s “statement that the gesture [plaintiff] made with his arms was
20 ‘obscene,’ without further description, is subjective and indefinite” and therefore not
21 actionable as defamation). As the Texas court held in *Zimmer*, the meaning of a hand
22 gesture “is an individual judgment that rest solely in the eye of the beholder and, as such,
23 is not an objectively verifiable statement of fact.” *Id.*

24 That is especially true for the “ok” hand gesture, which historically has meant that
25 something is fine but has recently evolved (depending on one’s subjective viewpoint) into
26 a symbol for white power or a “trolling” effort. As the Southern Poverty Law Center
27 explains:
28

1 So what does it mean when someone flashes the OK sign? In the end, it
2 can mean almost anything, but primarily it's one of three things:

- 3 • It can be a harmless use of its traditional meaning that all's well.
- 4 • It can be an ironic attempt to troll liberals with a symbol chosen to "trigger"
5 their inner [social justice warriors].
- 6 • It can be a surreptitious way of signaling your presence to other white
7 supremacists.

8 David Neiwert, *Is That an OK Sign? A White Power Symbol? Or Just a Right-Wing*
9 *Troll?*, Southern Poverty Law Center (Sept. 18, 2018), <https://www.splcenter.org/hatewatch/2018/09/18/ok-sign-white-power-symbol-or-just-right-wing-troll>.

10 Whether Plaintiff Antone subjectively meant the hand gesture as a harmless "ok,"
11 as a joke to "troll" others, or as a symbol of white supremacy is not something a jury
12 could determine with any objective criteria. A person's motives "can never be known for
13 sure," and speculations or characterizations of a person's motive—which is all we have
14 here—is "not information that the plaintiff might be able to prove false in a trial."
15 *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

16 That the meaning of the hand gesture lies in the eyes of the beholder precludes
17 treating it as an objective, provably false statement of fact. *See Buckley v. Littell*, 539
18 F.2d 882, 893 (2d Cir. 1976) (noting the varied meanings of "fascism" and therefore
19 declining to find the term actionable); *McCaskill v. Gallaudet Univ.*, 36 F. Sup. 3d 145,
20 159 (D.D.C. 2014) ("When a term admits of tremendous imprecision in meaning and
21 usage in the realm of political debate, it takes a lot to conclude that it is a statement of
22 fact. . . . Because different constituencies can hold different—and completely
23 plausible—views of Plaintiff's actions, statements characterizing those actions constitute
24 protected opinion." (internal quotation marks and alterations omitted)).

25 Characterizing someone as a white supremacist is not a provable assertion of fact,
26 either. That is why courts have held the charge not to be actionable. *See, e.g., Stevens v.*
27 *Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) ("In daily life 'racist' is hurled about so
28 indiscriminately that it is no more than a verbal slap in the face; the target can slap back

(as [plaintiff] did). It is not actionable unless it implies the existence of undisclosed, defamatory facts, and [plaintiff] has not relied on any such implication.”); *Smith v. Sch. Dist. of Phila.*, 112 F. Supp. 2d 417, 429 (E.D. Pa. 2000) (“While the Court acknowledges that a statement that plaintiff is ‘racist and anti-Semitic,’ if it was made, would be unflattering, annoying and embarrassing, such a statement does not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric.”); *Raible v. Newsweek, Inc.*, 341 F. Supp. 804, 807 (W.D. Pa. 1972) (“[T]o call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel”); *Overhill Farms, Inc. v. Lopez*, 119 Cal. Rptr. 3d 127, 140 (App. 2010) (“We agree that general statements charging a person with being racist, unfair, or unjust—without more—such as contained in the signs carried by protestors, constitute mere name calling and do not contain a provably false assertion of fact.”); *Puccia v. Edwards*, 10 Mass. L. Rep. 185 (Super. Ct. 1999) (“Many courts in other jurisdictions that have faced the issue of defamation claims based on accusations of bigotry have held the statements to be nonactionable statements of opinion.”).

In the end, “[s]tatements that can be interpreted as nothing more than rhetorical political invective, opinion, or hyperbole are protected speech.” *Burns v. Davis*, 196 Ariz. 155, 165 ¶ 39 (App. 1999). Because Senator Hobbs’s characterization of Plaintiff Antone’s “ok” hand gesture is not a provably false assertion of fact, it constitutes protected expression and is not actionable.

II. Plaintiffs Have Not Denied Being Part of the Group That Harassed Visitors and Staff at the Capitol.

“To be actionable as a matter of law, defamatory statements must be published in such a manner that they reasonably relate to specific individuals.” *Hansen v. Stoll*, 130 Ariz. 454, 458 (App. 1981). “While the individual need not be named, the burden rests on the plaintiff to show that the publication was ‘of and concerning’ him.” *Id.*

The “of and concerning” requirement “is not a mere superficial technicality or

1 trivial detail of American defamation law. Rather, [it] is a basic cornerstone doctrine that
2 reflects the deepest and most fundamental social policies embodied in the law of
3 defamation.” 1 Rodney A. Smolla, *Law of Defamation*, § 4:40.50 (2d ed. 2018). The
4 requirement “stands as a significant limitation on the universe of those who may seek a
5 legal remedy for communications they think to be false and defamatory.” *Kirch v.*
6 *Liberty Media Corp.*, 449 F.3d 388, 399–400 (2d Cir. 2006).

7 Critically, Senator Hobbs’s tweet never said that any of the Plaintiffs individually
8 had shown up at the Capitol with AR-15s, harassed elementary school children, or called
9 Democratic staff “illegals.” She said that they were *part of the group* that did. Plaintiffs
10 never deny that they were part of the group.

11 The distinction matters. Statements as to a group or entity do not, for purposes of
12 defamation law, translate to statements as to its individual members. *See Hansen*, 130
13 Ariz. at 458 (“When a group of persons are defamed, the statements must reasonably
14 relate to a certain individual member or members. If the group is so large, or the
15 statements so indefinite, that the objects of the defamatory statements cannot be readily
16 ascertained, the statements are not actionable.” (citations omitted)). As one court
17 explained:

18 Defamation is personal. Allegations of defamation by an organization and
19 its members are not interchangeable. Statements which refer to individual
20 members of an organization do not implicate the organization. By the same
21 reasoning, statements which refer to an organization do not implicate its
22 members.

23 *Jankovic v. Int’l Crisis Grp.*, 494 F.3d 1080, 1089 (D.C. Cir. 2007) (internal quotation
24 marks and alterations omitted).

25 By failing to deny being “part of the group” that engaged in the acts at issue,
26 Plaintiffs have failed to allege even falsity as to the second part of the tweet. But even if
27 the statement was false as to the group, defamation as to the group would not be
28 defamation as to its individual members. Plaintiffs have therefore failed to state a claim
for defamation as to themselves individually.

1 **III. Even If the Tweet Were Defamatory as to Plaintiffs, Senator Hobbs Enjoys**
2 **Legislative Immunity.**

3 The United States and Arizona Constitutions protect legislators from liability for
4 statements made in speech or debate in the Legislature. U.S. Const. Art. I, § 6, Cl. 1
5 (“[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be
6 questioned in any other Place.”); Ariz. Const. Art. IV, Pt. 2, § 7 (“No member of the
7 Legislature shall be liable in any civil or criminal prosecution for words spoken in
8 debate.”). The privilege also exists as a matter of common law. See Restatement
9 (Second) of Torts § 590 (“A member of the Congress of the United States or of a State or
10 local legislative body is absolutely privileged to publish defamatory matter concerning
11 another in the performance of his legislative functions.”); *Sanchez v. Coxon*, 175 Ariz.
12 93, 97 (1993) (adopting the Restatement’s “absolute immunity concept”).

13 “Accordingly, a state legislator engaging in legitimate legislative activity may not
14 be made to testify about those activities, including the motivation for his or her
15 decisions.” *Ariz. Indep. Redistricting Comm’n v. Fields*, 206 Ariz. 130, 137 ¶ 17 (App.
16 2003). The legislative privilege is absolute and “applies to legislators performing a
17 legislative function, although the defamatory matter has no relation to a legitimate object
18 of legislative concern.” *Sanchez*, 175 Ariz. at 97 (internal quotation marks omitted).

19 To be sure, “[t]his legislative privilege does not extend to cloak all things in any
20 way related to the legislative process.” *Fields*, 206 Ariz. at 137 ¶ 18 (internal quotation
21 marks omitted). Rather, “the privilege extends to matters beyond pure speech or debate
22 in the legislature only when such matters are an integral part of the deliberative and
23 communicative processes relating to proposed legislation or other matters placed within
24 the jurisdiction of the legislature, and when necessary to prevent indirect impairment of
25 such deliberation.” *Id.*; see also *Gravel v. United States*, 408 U.S. 606, 624 (1972)
26 (noting that the Speech & Debate Clause protects conduct that “is within the sphere of
27 legitimate legislative activity” (internal quotation marks omitted)).

28 The conduct at issue here squarely was necessary to prevent the impairment of

1 legislative deliberation. Senator Hobbs directed the tweet to Governor Ducey so that he
2 could denounce a group that she alleged arrived to the Capitol with firearms and
3 threatened and harassed visitors and staff. The Capitol, of course, is the Legislature's
4 place of business, and disturbing the peace of that place and harassing its staff would
5 certainly impair legislative deliberation. In encouraging the Governor to distance himself
6 from this group in her capacity as a legislative leader, Senator Hobbs was necessarily
7 acting to protect the Legislature's place of work by discouraging the group from
8 returning. Senator Hobbs was thus performing a legislative function and is immune from
9 liability for the statement.

10 **IV. This Suit Should be Dismissed Under Arizona's Anti-SLAPP Statute.**

11 Arizona law protects defendants against strategic lawsuits against public
12 participation ("SLAPP"). The anti-SLAPP statute allows a defendant to file a motion to
13 dismiss "[i]n any legal action that involves a party's exercise of the right of petition."

14 A.R.S. § 12-752(A). As is relevant here, an "exercise of the right of petition" means:

15 [A]ny written or oral statement that falls within the constitutional protection
16 of free speech and . . . that is all of the following:

17 (a) Made before or submitted to a legislative or executive body or any
18 other governmental proceeding.

19 (b) Made in connection with an issue that is under consideration or review
20 by a legislative or executive body or any other governmental proceeding.

21 (c) Made for the purpose of influencing a governmental action, decision or
22 result.

23 A.R.S. § 12-751(1). A "governmental proceeding" is defined, in relevant part, as "any
24 proceeding, other than a judicial proceeding, by an officer, official or body of this state."

25 A.R.S. § 12-751(2).

26 A court must grant the motion unless the nonmoving party "shows that the
27 moving party's exercise of the right of petition did not contain any reasonable factual
28 support or any arguable basis in law and that the moving party's acts caused actual

1 compensable injury to the responding party.” A.R.S. § 12-752(B). If the Court grants the
2 motion, it must award the moving party its costs and reasonable attorneys’ fees, including
3 those incurred in bringing the motion. A.R.S. § 12-752(D).

4 The statement at issue involves Senator Hobbs’s right of petition as defined in the
5 anti-SLAPP statute. *See* A.R.S. § 12-751(1). The tweet falls within the constitutional
6 protection of free speech because it touches on a matter of public concern, constitutes
7 opinion, and is not defamatory. She directed the tweet to the Governor, who is the state’s
8 head executive officer. Ariz. Const. Art. V, §§ 1, 4. And she did so in connection with
9 an issue that was under consideration by him, seeking to influence the Governor to
10 denounce a group that was alleged to have harassed visitors and staff at the Arizona
11 Capitol.

12 Because this lawsuit attempts to impose liability for Senator Hobbs’s exercise of
13 her constitutionally protected right to petition the Governor to take action on a matter of
14 public significance, it falls within the ambit of the anti-SLAPP statute. As a result, the
15 suit should be dismissed, and Senator Hobbs should be awarded her attorneys’ fees
16 incurred in bringing this motion.

17 Conclusion

18 For the foregoing reasons, the Court should dismiss Plaintiffs’ Complaint and
19 award Senator Hobbs her attorneys’ fees incurred in bringing this motion.

20 RESPECTFULLY SUBMITTED this 6th day of November, 2018.

21 BALLARD SPAHR LLP

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CERTIFICATE OF SERVICE

I certify that on this 6th day of November, 2018, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Superior Court, Maricopa County, for filing using the AZTurboCourt System.

A complete copy of the foregoing sent via email this same date to the following:

Jennifer Harrison

[REDACTED]

Plaintiff

Lesa Antone

[REDACTED]

Plaintiff

Jeremy Bronaugh

[REDACTED]

Plaintiff

Russell Jaffe

[REDACTED]

Plaintiff

/s/ Christina M. Revering